SUPREME COURT, U.S.
FILED
AUG 24 1992
OFFICE OF THE CLERK

No. 92-193

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1992

JACK MORGAN, Warden,

Petitioner,

vs.

JAMES THOMAS JEFFERSON,

Respondent.

Petition For Writ Of Certiorari To The
United States Court Of Appeals
For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When there is clear evidence of discrimination against African Americans in the selection of grand jury members for a period of over ten years, does the coincidence that the racial makeup of the grand jury that indicted the defendant approximates the racial makeup of the community obviate the inherent prejudice of a discriminatory grand juror selection process?

2. Should the Court overrule the longstanding precedent that discriminatory selection of the grand jury venire is not subject to harmless error analysis?

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OPINIONS BELOW

The opinions of the United States Court of Appeals for the Sixth Circuit and of the United States District Court for the Middle District of Tennessee are properly cited in the Petition for Writ of Certiorari filed on behalf of Jack Morgan and are contained in the state's Petition.

For a complete understanding of the Opinion of the District Court it is necessary to include the Report and Recommendation of the Magistrate which was excluded from the state's Petition and is attached.

STATEMENT OF THE CASE

Respondent, James Thomas Jefferson, was indicted in 1968 by a Davidson County, Tennessee grand jury for first degree murder, rape and two counts of assault with intent to commit murder. These offenses were tried separately. See, State v. Jefferson, 529 S.W.2d 674, 677 (Tenn. 1975). Jefferson was tried first for the rape and the jury was unable to reach a verdict. Jefferson was then tried on the charge of murder and received a sentence of 99 years in the state penitentiary. 529 S.W.2d at 678. Prior to trial, Jefferson filed a plea in abatement challenging the racial compositions of both the grand jury and the petit jury venires. 529 S.W.2d at 678. The trial court denied that there was a

systematic exclusion of blacks from the grand and petit juries in Davidson County. 529 S.W.2d at 680. This ruling of the trial court was reached without the benefit of a hearing. 529 S.W.2d at 680.

On appeal the issues of systematic exclusion of black citizens from the grand and petit juries were remanded to the trial court to determine whether there was a systematic exclusion of African-Americans from those bodies. 529 S.W.2d at 680.

When the trial court addressed the issue on remand, it limited proof of the composition of the particular grand jury which indicted Jefferson and the petit jury which convicted him. The trial court, basing its finding on focusing on the May 1968 grand jury and 1971 petit jury, held that there was no systematic exclusion of blacks from the grand jury or petit jury. Jefferson v. State, 559 S.W.2d 649, 651, 652 (Tenn. Cr. App. 1977). The Court of Criminal Appeals affirmed the holding of the trial court. 559 S.W.2d at 652.

Jefferson next filed a pro se habeas corpus petition in the United States District Court for the Middle District of Tennessee pursuant to 28 U.S.C. § 2254. Jefferson v. Dutton, 607 F.Supp. 355 (M.D. Tenn. 1985). Counsel was appointed and filed a response to the state's motion for summary judgment that included a challenge to the systematic exclusion of blacks as foremen of the Davidson County grand jury based upon this Court's holding in Rose v. Mitchell, 443 U.S. 545 (1979), which had been decided after the Jefferson's Plea in Abatement but was encompassed within his

general challenge to the composition of the grand jury.

After a lengthy evidentiary hearing the district court ruled that there had been a systematic exclusion of blacks as foremen of the grand jury based upon a ten year history wherein no blacks were appointed foreman. 607 F.Supp. at 358 - 360). The district court further held that the method of selecting the grand jury foreman had been encompassed within Jefferson's original claims and that state remedies had been exhausted. Jefferson v. Dutton, 607 F.Supp. at 357, n. 4. The district court ordered Jefferson released or retried within 90 days. The state appealed to the Sixth Circuit, which reversed the district court, finding under Rose v. Lundy, 455 U.S. 509 (1982), that the issue of systematic exclusion in the selection of the grand jury foreman had not been exhausted. Jefferson v. Dutton, No. 85-5335 (6th Cir. June 10, 1986).

On August 26, 1986, Jefferson filed his petition for post conviction relief in the state trial court challenging the grand jury foreman issue. The state trial court ruled that the Supreme Court's holding in Rose v. Mitchell, supra, was in error because the foreman of the grand jury in Tennessee had no enhanced powers. Therefore, any racial discrimination engendered in that process was to be treated as discrimination in the selection of the entire grand jury.[1] State v. Jefferson, 769 S.W.2d 875 (Tenn. Cr. App.

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[1] The state, after raising the exhaustion issue in the United States District Court through a motion to dismiss (State v. Jefferson, 769 S.W.2d at 876), apparently abandoned that position once the case was again before the state courts, and argued that the grand jury foreman issue was not a separate issue after all.

1988). The trial court then considered the question of systematic exclusion of blacks in the entire grand jury selection process and held that it was bound by the previous findings of the Court of Criminal Appeals in Jefferson v. State, 559 S.W.2d 649. On December 28, 1988, the Tennessee Court of Criminal Appeals concluded that the holding in Rose v. Mitchell did not create an independent claim under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because the Supreme Court had misstated the powers of the office. 769 S.W.2d at 877. The majority opinion went on to conclude that the prior finding that there had been no discrimination in the selection process rendered by the Court of Criminal Appeals in Jefferson v. State, 559 S.W.2d 649, was correct. 769 S.W.2d at 878.

One judge dissented pointing out the significance, for equal protection analysis, of the Davidson County procedure for appointing grand jury foremen was that they were appointed separately from the other grand jurors. Therefore, if the selection process were racially biased it would impermissibly effect the makeup of the grand jury notwithstanding the powers or lack of powers of office of foreman. 769 S.W.2d at 878-880 (Wade dissenting).

Permission to appeal to the Tennessee Supreme Court was denied on April 3, 1989. State v. Jefferson, 769 S.W.2d at 875.

On May 19, 1989, Jefferson filed his second petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, in the United

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769 S.W.2d at 876, 877.

States District Court. The matter was then referred to the magistrate who reinstated the prior opinion of the district court as the law of the case, and concluded that the district court's former opinion was not premised on the theory that the foreperson played a distinct role, and that the district court's view of the rule of the foreperson was similar to that articulated by the state courts. (Appendix at A-11).

On May 20, 1991, the district court adopted the Report and Recommendation of the magistrate and ordered the state to reindict Jefferson within 90 days or release him from custody. (Appendix B to State's Petition). Subsequently, this order was stayed and the state filed notice of appeal to this court.

The salient facts in this case were set out in the Report and Recommendation of the magistrate which was adopted by the district court. The magistrate recommended that the prior findings of facts and conclusions reported in Jefferson v. Dutton, 607 F.Supp. 355 (M.D. Tenn. 1985), be reinstated under the doctrine of the "law of the case." (Appendix at A-2).

In the decade prior to Jefferson's indictment (1958-1968), there had been thirty-three grand juries selected by the criminal court judges of Davidson County. Seventeen of these thirty-three grand juries had only one black member, seven had no blacks, and the number of blacks on eight of the grand juries was unknown. Two blacks participated in the grand jury that indicted Jefferson. The court below found that "all twenty-five of the grand juries, for which data is available, had a percentage of blacks that was

significantly less than the percentage of the population of blacks in Davidson County. (Appendix at A-4).

During the period in question, the Davidson County grand juries were selected under a key-man system, primarily by the Honorable Raymond H. Leathers, who served as Criminal Court Judge from 1958 throughout the relevant period, and the Honorable John L. Draper, who served as the Judge of Division II of the Davidson County Criminal Court beginning in October 1960. Judges Draper and Leathers testified that they selected members of the grand jury, and in particular the grand jury forepersons, on characteristics that included "citizenship activities, maturity, work experience, standing in the community, and general qualities of good citizenship." They further testified that they depended on first-hand knowledge and referrals from friends and civic groups as the basis for recruiting grand jurors. (Appendix at A-4, A-5). Utilizing this criteria and the basis of evidence available of twenty-six grand juries selected from 1958 through 1968, all twenty-six foremen were white. Fourteen of the two hundred and fifty-two grand jurors were black. In addition, there was evidence of five additional grand juries and seven additional foremen indicating that all thirty-three grand jury foremen during the period were white and on twenty-six grand juries there were a total of three hundred and twelve non-foreman positions of which "no more than twenty (6.45%) were black." (Appendix at A-4, A-5). In addition, the proof showed that the grand jury that actually indicted Jefferson included two black members.

In 1971, three years after the indictment in this matter, the procedure was "changed to a system whereby both grand jurors and petit jurors were selected by computerized lists." (Appendix at A-4).

During this relevant period of time census figures showed that the black population of Davidson County was approximately nineteen percent. (Appendix at A-4). Therefore, all twenty-five grand juries for which a racial breakdown exists had a significantly lower proportion of blacks than did the population of the county. (Appendix at A-4).

SUMMARY OF ARGUMENT

In the instant matter, respondent, James T. Jefferson, demonstrated that the grand jury selection process excluded African Americans. This type of discrimination has been severely criticized by this Court since its decision in Strauder v. West Virginia, in 1880. It is no less serious today and its presence requires reversal of the conviction.

Vasquez v. Hillary continues to be good law and the harmless error analysis is inappropriate to constitutional violations that strike at the fundamental nature of the criminal justice system and of our society as a whole.

ARGUMENT

I. UPON A SHOWING OF DISCRIMINATORY SELECTION OF THE GRAND JURY VENIRE, A CRIMINAL DEFENDANT IS ENTITLED TO THE REVERSAL OF HIS CONVICTION AND DISMISSAL OF THE INDICTMENT.

The problem of exclusion of blacks and other well-defined groups from proper representation on state petit and grand juries has long been recognized in the United States. The Supreme Court made the eradication of such a system a priority over 100 years ago in the landmark decision of Strauder v. West Virginia, 100 U.S. 303 (1880). The Court stated at that time that the ramifications of such a system are repugnant to our notion of justice as it denies and excludes potential jurors "the privilege of participating equally. . . in the administration of justice." 100 U.S. at 308. As noted by the court below, in Rose v. Mitchell this Court summarized the harm resulting from intentional discrimination in the jury selection process as follows:

> Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice. Selection of members of a grand jury because they are of one race and not another destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process. The exclusion from the grand jury service of Negroes, or any group otherwise qualified to serve, impairs the confidence of the public in the administration of justice. As this Court repeatedly has emphasized, such discrimination "not only violates our Constitution and the laws created under it, but is at war with our basic concepts of a democratic society and a representative government." Smith v. Texas, 311 U.S. 128, 130 (1940) (footnote omitted). The harm is not only to the accused, indicted as he is by a jury from which a segment of the community has been excluded. It is to society as a whole. " The injury is not limited to the defendant -- there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideals reflected in the processes of our courts." Ballard v. United States, 229 U.S. 187, 195, 91 L.Ed.2d 181, 67 S.Ct. 261 (1946).

439 U.S. at 555-556. The importance of this issue not only to the defendant but to the system of justice was reiterated in Powers v.

Ohio, in which the Court reiterated "the broader constitutional imperative of race neutrality in jury selection and gave standing to criminal defendants to raise the interest of the excluded juror. ___ U.S. ___, 111 S.Ct. 1364, 1366, 1373 (1991).

Castaneda v. Partida, 430 U.S. 482, 51 L.Ed.2d 498, 97 S.Ct. 1272 (1977) sets forth the standard for determining whether a defendant has made a prima facie showing of discrimination in the selection of a state grand jury in violation of the equal protection clause of the Fourteenth Amendment. Under the rules set forth in Castaneda the petitioner is required to show that "the procedure employed resulted in substantial underrepresentation of his race or of the identifiable group to which he belongs." 430 U.S. at 494. First the individual must show that he is an identifiable member of a group that is a "recognizable, distinct class, singled out for different treatment under the laws, as written or as applied." 430 U.S. at 494. The next step under Castaneda is to prove a degree of underrepresentation over a significant period of time by "comparing the proportion of the group in the total population to the proportion called to serve as grand jurors over a significant period of time." 430 U.S. at 494. Once this showing is made, the petitioner need only show that the selection procedure employed "is susceptible of abuse or is not racially neutral" in order to support a presumption of discrimination. Id. After this showing is made, the burden shifts to the state to present proof to rebut the petitioner's case. 430 U.S. at 495.

In the instant case, as held by the district court and affirmed by the court of appeals, there can be no question that Jefferson has established a prima facie case. The district court found that Jefferson was a black citizen, and with regard to the first prong of the Castaneda test, "blacks are clearly a suspect category for purposes of equal protection analysis." (Appendix at A-3, A-6; Jefferson v. Dutton, 607 F.Supp. 355, 357, 358 (M.D. Tenn. 1985)). With regard to the "rule of exclusion" Jefferson produced evidence concerning thirty-three (33) grand juries empaneled over the relevant period. Of these thirty-three grand juries surveyed during the period, seventeen had only one black member, seven had no blacks and the number of blacks on the additional eight was unknown. With regard to the grand jury foremen, who were separately selected, not a single of the thirty-three foremen was black nor a member of any other minority group. However, in considering twenty-six juries for which there were statistics during the period, only fourteen of two hundred and fifty-two jurors were black. Thus, approximately 6.45% of the grand jurors were black at a time when 19% of the population of Davidson County was black. (Appendix at A-4, A-5).

Moreover, not only has Jefferson established the requisite underrepresentation under Castaneda, his position is further supported in this matter in that the key-man system which was utilized in Davidson County at the time has been repeatedly held to be susceptible to abuse. Rose v. Mitchell, 443 U.S. at 566; see also, Castaneda v. Partida, 430 U.S. at 497 (Texas' key-man system

is susceptible to abuse). As noted by the district court in its earlier opinion, the appointing judges under the Davidson County key-man system were aware of the race of the grand jurors they appointed. 607 F.Supp. at 358.

The state does not challenge the finding that Jefferson proved the discriminatory selection of the grand jury during the relevant time frame. Rather the state argues that the equal protection violation is cured by the accidental coincidence that, of all the many grand juries over a more than ten year period, the one that indicted Jefferson included two African Americans, which constituted the requisite proportional representation from the defendant's racial group. The state suggests the ten years prior to Jefferson's indictment as well as the three years after Jefferson's indictment which amply demonstrate the absolute underrepresentation of blacks on the grand jury, not to mention the fact that there were no black grand jury foremen should be ignored. The state suggests that because the percentage of blacks on this one isolated grand jury approximated the proportion in the community that Jefferson cannot challenge the venire. (Petition for Writ of Certiorari at 7-10). This logic flies in the face of all the precedent on this issue.

This Court has repeatedly reminded us of the gravity upon which it views the systematic exclusion of African-Americans from the grand and petit juries which the Court first announced in Strauder v. West Virginia, 100 U.S. 303, 25 L.Ed. 664 (1880). In Norris v. Alabama, 294 U.S. 587, 589, 55 S.Ct. 579, 79 L.Ed. 1074

(1934), the Court stated:

> There is no controversy as to the constitutional principle involved. That principle, long since declared, was not challenged, but was expressly recognized, by the Supreme Court of the State. Summing up precisely the effect of earlier decisions, this Court thus stated the principle in Carter v. Texas [citation omitted] in relation to exclusion from service on grand juries: "whenever by any action of a State, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in a criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment of the Constitution of the United States. [citations omitted]

As observed by the Norris Court, this statement has been often repeated. Id. The Court again emphasized this position in Vasquez

> v. Hillery, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986), and further stated:
> We reaffirmed our conviction that discrimination on the basis of race in the selection of grand jurors "strikes at the fundamental values of our judicial system and our society as a whole," and that the criminal defendant's right to equal protection of the laws has been denied when he is indicted by a grand jury from which members of a racial group purposefully have been excluded.

474 U.S. at 262 (citing Rose v. Mitchell, 443 U.S. at 556, 99 S.Ct. at 3000). The courts have made it very clear that the right to be indicted and tried by a grand and petit jury free from intentional discrimination is neither subject the limitations of harmless error nor to the particular make-up of the jury involved in an individual's case.

This Court has recently cited Vasquez in reminding us of the importance of precedent. The Court stated in Hilton v. South Carolina Railways Commission, "the doctrine of stare decisis is of

fundamental importance to the rule of law." _____U.S._____, 112 S.Ct. 560, 563 (1991). The Court continued, "Adherence to precedent promotes stability, predictability, and respect for judicial authority." Id. at 564 (quoting Vasquez, 474 U.S. at 265 - 266).

II. THERE IS NO REASON TO OVERRULE THE LONGSTANDING PRECEDENT THAT SYSTEMATIC EXCLUSION OF A RACIAL GROUP FROM THE GRAND JURY VENIRE IS NOT SUBJECT TO HARMLESS ERROR ANALYSIS.

The state argues that the indictment by a grand jury that was chosen in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution should be subjected in this matter to the harmless error standard. In Vasquez v. Hillery, 474 U.S. 254 (1986), this Court reviewed its history of finding that the purposeful exclusion of a racial group from service on petit and grand juries and observed that the Court had repeatedly upheld, for over a hundred years, the conclusion that such violation of the Equal Protection Clause required the reversal of the conviction and the dismissal of the indictment. 474 U.S. at 264. The Court observed in Vasquez v. Hillery, 747 U.S. at 260, 261 that:

> In 1880, this Court reversed a state conviction on the ground that the indictment charging the offense had been issued by a grand jury from which blacks had been excluded. We reasoned that deliberate exclusion of blacks "is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to the securing to individuals of the race that equal justice which the law aims to secure to all others."

747 U.S. at 260, 261 (citing Strauder v. West Virginia, 100 U.S. at 308). The Court then stated "Thereafter, the Court has repeatedly

rejected all arguments that a conviction may stand despite racial discrimination in the selection of the grand jury." [citations omitted] The Court observed that it had "explicitly addressed the question" of whether they should reconsider this line of cases as late as 1979 in Rose v. Mitchell, 443 U.S. 545. The Court then stated:

> We reaffirmed our conviction that discrimination on the basis of race in the selection of grand jurors "strikes at the fundamental values of our judicial system and our society as a whole," and that the criminal defendant's right to equal protection of the laws has been denied when he is indicted by a grand jury from which members of a racial group purposely have been excluded.

474 U.S. at 262 (citing Rose v. Mitchell, 443 U.S. 556). The Court further found that it was improper to use harmless error analysis in these violations because "intentional discrimination in the selection of grand jurors is a grave constitutional trespass, possible only under color of state authority, and wholly within the power of the State to prevent." 474 U.S. at 262.

The state's reliance on United States v. Mechanik, 475 U.S. 66, 106 S.Ct. 938, 89 L.Ed.2d 50 (1986), is simply misplaced. In Mechanik the error before the grand jury that was found to be harmless was that two government witnesses had appeared simultaneously in violation of Rule 6(d) of the Federal Rules of Criminal Procedure. It is beyond question that the violation of a rule of procedure does not raise to the same level for the purpose of harmless error analysis as does violation which effects not only the accused but the race or class which is systematically excluded from jury service, and therefore, effects the society as a whole.

The state also misses the mark with its citation to Bank of Nova Scotia v. United States, 487 U.S. 250 (1988). The Court made very clear that Bank of Nova Scotia involved the use of the supervisory power of the federal courts to circumvent the harmless error rule when only nonconstitutional interests were involved. Id. at 254. The Court specifically addressed the issue raised here when it stated:

> To be distinguished from the cases before us are a class of cases in which indictments are dismissed, without a particular assessment of the prejudicial impact of the errors in each case, because the errors are deemed fundamental. These cases may be explained as isolated exceptions to the harmless-error rule. We think, however, that an alternative and more clear explanation is that these cases are ones in which the structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair, allowing the presumption of prejudice. (citation omitted). These cases are exemplified by Vasquez v. Hillary (citation omitted) where we held that racial discrimination in selection of grand jurors compelled dismissal of the indictment. In addition to involving an error of constitutional magnitude, other remedies were impractical and it could be presumed that a discriminatorily selected grand jury would treat defendants unfairly. (citation omitted).

Id. at 256, 257.

The State of Tennessee has provided no reason for the Court to reconsider this long enduring and carefully considered limited exception to the harmless error rule.[2]

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[2] Before the district court the state had submitted evidence through the District Attorney of Davidson County that evidence was no longer available to retry Jefferson and submitted that as grounds to impose the harmless error rule. However, since the decision of the Sixth Circuit the state has suddenly discovered that the evidence was available all along and Jefferson has now been reindicted.

CONCLUSION

For the reasons set forth above the instant case does not present an issue for review on certiorari and the respondent, James Thomas Jefferson, prays that this Court will deny the petition of the State of Tennessee.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that three true and exact copies of the foregoing have been forwarded by first class mail, postage prepaid, to Charles Burson, Attorney General and Reporter, and Debra K. Inglis, Assistant Attorney General, 450 James Robertson Parkway, Nashville, Tennessee 37243-0485, on this the 19th day of August, 1992.

Donald E. Dawson
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